Supreme Court, U.S.
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No. 02-140

IN THE

Supreme Court of the United States

IAIN FRASER, *et al.*,

Petitioners,

v.

MAJOR LEAGUE SOCCER, L.L.C., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNITED STATES SOCCER FEDERATION, INC.

JON PAUL ROBBINS
PETER C. ALKALAY*
MCLAUGHLIN & STERN, LLP
Attorneys for Respondent
United States Soccer Federation, Inc.
260 Madison Avenue
New York, NY 10016
(212) 448-1100

* *Counsel of Record*

175855

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER STATEMENT OF QUESTION PRESENTED

Was the Court of Appeals for the First Circuit correct when it concluded, on the specific facts presented to it in this case, that Petitioners were required to prove the alleged relevant market as an element of their claim that Major League Soccer and the United States Soccer Federation, Inc. had engaged in a "conspiracy to monopolize" under Section 2 of the Sherman Act?

STATEMENT PURSUANT TO RULE 29.6

Respondent United States Soccer Federation, Inc. states that it has no parent corporation, and no public corporation owns 10% or more of its stock.

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Respondent United States Soccer Federation, Inc. ("USSF") submits this brief in opposition to the petition for certiorari of the Petitioners Iain Fraser, Steve Trittshuh, Sean Bowers, Mark Semioli, Rhett Harty, David Scott Vaudreuil, Mark Dodd and Mark Dougherty (the "Petitioners"). The other Respondents, Major League Soccer, L.L.C. ("MLS") and its investor-operators (collectively, the "MLS Respondents") also are submitting a brief in opposition to the petition.

COUNTER STATEMENT OF THE CASE

Background of the Litigation

USSF is designated by the United States Olympic Committee (the "USOC") as the national governing body of soccer in the United States, as set forth in the Ted Stevens Olympic and Amateur Sports Act (36 U.S.C. Secs. 220501, *et seq.*) (the "Sports Act") (A 6560).[1]

Congress passed the original of the Sports Act in 1978, creating a vertical structure for the management of sports in the United States. The USOC is at the head of this vertical structure, and it acts as the coordinating body for sports in which American athletes compete at the international level.

Each sport included in the Olympic or Pan-American games has a "national governing body," which functions at the level below the USOC. *See* 36 U.S.C. § 220521. To be recognized as a national governing body, a sports organization must demonstrate autonomy in its sport, and it must independently decide and control all matters central to governance of that

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1. Numerical references with the prefix "A" refer to pages in the Appendix at the Court of Appeals.

sport. Once established, a national governing body has broad authority. *See* 36 U.S.C. §§ 220523-220524. A national governing body establishes national goals for its sport, and it acts as the coordinating body for the sport in the United States. In addition, the national governing body is responsible for developing interest and participation in the sport throughout the United States. The national governing body also selects and recommends to USOC the members of the Olympic Team for the sport. USSF is the national governing body for soccer in the United States. It is a non profit corporation (A 6560-6562).

The structure created by the Sports Act is applicable to this action, which involves professional athletes. The Sports Act (36 U.S.C. § 220501) defines "amateur athlete" as an athlete "who meets the eligibility standards established by the national governing body or paraolympic sports organization for the sport in which the athlete competes." USSF has eligibility standards which permit professionals to compete.[2] The USSF selects and recommends players for the United States Olympic Soccer Team, and at the last Olympics in 2000, all but one of those players was a professional (A 6560). The USSF also selects the players for both the men and women's National Soccer Teams, who represent the United States in other international competitions. Professionals play on the national teams, and they are subject to USSF's governance (A 6559-6560).

This case arises out of the effort to establish a Division 1 (top flight) professional league in the United States. Soccer is the most popular professional team sport in the world,

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2. Many other national governing bodies have eligibility standards that permit professionals to compete. Examples include basketball's " Dream Team;" skiing; and track and field (A 6561).

in virtually every country other than the United States (A 6559). There have been many attempts to form top-flight professional soccer leagues in the United States. Prior to the 1990's, only the North American Soccer League had received the Division 1 sanction from USSF, the highest designation possible. That league eventually failed and terminated operations in or about 1984 (A 6562).

The Federation Internationale de Football Association ("FIFA") is the international federation that governs all professional and amateur soccer worldwide. USSF is a member of FIFA(A 6560-6561; 6572).

FIFA awarded the United States the right to host the 1994 World Cup soccer tournament, which is the largest sporting event in the world. FIFA required, as a condition of this award, the establishment of a Division 1 professional league in the United States as soon as possible (A 6572).

USSF, as the national governing body, had the responsibility of sanctioning a Division 1 league which would fulfill the FIFA mandate (A 6572-6573). USSF made the decision that, initially, only one entity would be sanctioned as a Division 1 league. No other country, including those where soccer is the most popular sport, has more than one Division 1 league. In making this decision, USSF considered the fact that professional soccer had never been successfully established in this country. USSF believed that all available resources — USSF support, players, fans, and sponsors — should be devoted to supporting a single league, in the first instance. USSF decided it was necessary to "incubate" one, and only one, Division 1 league (A 6582; *see also*, PX 190, at A 7968, *et seq.*).

USSF publicized the fact that it was planning to sanction a Division 1 league. In December 1993, after evaluating submissions made by three competing bidders, including MLS, USSF preliminarily endorsed MLS as the Division 1 league for soccer in the United States (Ex. 190, A 7968, *et seq.*).

MLS and two other contenders submitted proposals to USSF. Petitioners have claimed that USSF should have approved the American Professional Soccer League ("APSL). The proof at the trial was that APSL was not, in fact, qualified (A 6573; 6577; DX 1304). APSL was a minor league and its plan, as presented to USSF, was a minor league plan (A 6581; DX 1304).

USSF considered the idea of designating two leagues, and voted against it. The USSF board members believed that all resources should be utilized for one league, to give it a chance of success (A 6582; *See also* PX 190, A-7968, *et seq.*). The "one league" rule had been in effect since at least 1988 (A 6576; *See also* DX 1049, p.15, at A-8361). It had not been put in place for MLS' benefit (A 6576). Indeed, APSL's own business plans assumed there would be only one division one league. *See* PX 3 at page 95 (A-7599).

USSF's good faith is shown by the agreement it reached with APSL, in January of 1995, as evidenced by the document introduced as DX 1075 (A-8438). USSF, APSL and MLS all agreed that MLS' exclusivity would end after two years. USSF acted reasonably when it determined that this short period of incubation was necessary to give the new league a chance to survive.

The Action

Petitioners are professional soccer players who play, or have played, in MLS. They commenced this anti-trust action against MLS, against the investor-operators of MLS, and also against USSF. The complaint contained several causes of action, only two of which were asserted against USSF. One of those causes of action was discontinued by stipulation. Count III of the complaint, the only remaining cause of action against USSF as of the date of trial, alleged, *inter alia*, that MLS, its investor-operators, and USSF conspired to monopolize the market for Division 1 (top flight) professional soccer player services in the United States.

Respondents denied the material allegations of the complaint. At the trial Respondents contended, among other things, that the United States did not constitute the relevant geographic market. Respondents contended that the market for professional soccer players is international, and that the United States does not by itself constitute a discrete market. Respondents also contended that the relevant services market was not limited to Division I player services, because such services were interchangeable with services of players in Division II and Division III.

The above described monopolization count was tried to a jury. The trial lasted nearly three months. The trial court submitted a special verdict sheet to the jury, the first questions of which dealt with the issue of whether Petitioners had proved that the relevant market was limited to Division 1 soccer player services and to the United States. The jury found that Petitioners failed to do so. Accordingly, the trial court entered judgment dismissing this count against all the Appellees. As noted, it was the only remaining count against USSF.

The First Circuit affirmed the judgment of the trial court. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002). Petitioners ask this Court to grant their petition for a writ of certiorari. The petition should be denied.

REASONS FOR DENYING THE WRIT

The First Circuit did not hold that proof of a relevant market always is an essential element of a § 2 conspiracy claim. It stated that such proof might not be required if the agreement underlying the alleged conspiracy is illegal *per se*. The First Circuit then held that if the agreement between the alleged conspirators is not inherently illegal, then proof of a relevant market is required to prevail in a § 2 conspiracy case. 284 F.3d at 67-69. The First Circuit cited with approval (284 F.3d at 68) IIIA Areeda & Hovenkamp, *Antitrust Law* ¶ 809 (1996):

> Where the agreements involved would also be held to offend § 1 without the necessity of proving power, the failure to require it for § 2 conspiracy offense is understandable. *However, in those instances where [market] power is a prerequisite to holding an agreement to be an unreasonable restraint of trade — a joint venture, for example — it would make no sense to hold the same agreement offensive to § 2 without proof of power.*

(Emphasis in opinion of the First Circuit).

Petitioners argue that there is a growing split among the circuits on this issue. That is not correct. As the First Circuit noted (284 F.3d at 67), the courts which have held that proof of a relevant market is not required to prove a § 2 conspiracy

have done so "often without analysis." Those courts have not considered the issue of whether proof of a relevant market is an essential element of a § 2 conspiracy claim when the alleged agreement is not itself inherently illegal. Thus, it cannot be said that there is a split among the circuits.

USSF also adopts the argument on the relevant market issue set forth in the brief of the MLS Respondents.

CONCLUSION

For all the foregoing reasons, USSF respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

JON PAUL ROBBINS
PETER C. ALKALAY*
MCLAUGHLIN & STERN, LLP
Attorneys for Respondent
United States Soccer Federation, Inc.
260 Madison Avenue
New York, NY 10016
(212) 448-1100

* *Counsel of Record*